IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 8-2-2005

Coram:

The Honourable Mr. Justice T.V. MASILAMANI

Second Appeal No.997 of 1994

1. Amudha
2. Minor J. Sentamil Selvan
3. Minor J. Vijayakumar
4. Minor J. Vijaya Lakshmi .. Appellants/Plaintiffs

[2 to 4 Appellants are minor rep. By their mother and natural guardian Tmt. Amudha-1st Appellant]

vs.

1. K. Jeyaraman
2. J. Kuppusamy .. Respondents/Defendants

Second Appeal against the judgment and decree dated 5.11.1993 made in A.S. No.88 of 1992 on the file of the Additional Sub Judge, Chengalpattu confirming the judgment and decree dated 7.8.1992 in O.S.No.269 of 1985 on the file of the District Munsif, Maduranthakam.

For Appellants : Mr.J.R.K. Bhavananthan

For Respondent-1 : Mr.A.Kalaiazhagan

For Respondent-2 : Mr.T.V. Krishnamachari

JUDGMENT

The appellants are the plaintiffs in the suit who failed before both the courts below.

2. The 1st appellant/1st plaintiff is the mother of the appellants 2 to 4/minor plaintiffs 2 to 4 in the suit. The 1st respondent/1st defendant is the husband of the 1st appellant and father of the appellants 2 to 4. The 2nd respondent/2nd defendant is the purchaser of the suit property from the 1st respondent.

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3. The appellants filed the suit for partition against the respondents and separate possession of 1/4th share each in the suit properties. The 1st respondent remained exparte and the 2nd respondent contested the suit. The learned District Munsif, having considered the evidence on record, both oral and documentary, adduced on either side and upon hearing the arguments of both sides, dismissed the suit. Aggrieved over the said judgment and decree passed by the trial court, the appellants preferred the appeal in A.S.No.88 of 1992 on the file of the Additional Subordinate Judge, Chengalpattu. The learned Subordinate Judge, having analysed the recorded evidence and after hearing both sides, dismissed the appeal by confirming the judgment and decree passed by the trial Court. Hence, the Second Appeal.

4. The averments in the plaint filed by the appellants/plaintiffs are briefly as follows:-

(a) The 1st defendant's father Kanna Pillai married one Chinnakulanthai as his first wife and the 1st defendant was born to the first wife. Subsequently, the said Kanna Pillai married one Saroja as his second wife and he had two sons and five daughters. The said Kanna Pillai was in possession and enjoyment of ancestral nanja and punja lands and a house at Siruthamur village. The 1st defendant demanded partition of his share in the family properties and since there had been dispute between Kanna Pillai and the 1st defendant, a panchayat was held and in the said panchayat, the 1st defendant released his right in the family properties and received Rs.10,000/- from his father Kanna Pillai as consideration.

(b) On 29.10.1977, the 1st defendant as kartha of the joint family consisting of himself and the plaintiffs purchased the suit properties from one Ranganathan Reddiar for a valuable consideration of Rs.7,000/-. The suit properties are punja lands measuring 5.70 acres. Since there had been misunderstanding between the 1st plaintiff and the 1st defendant, the husband is living separately and paying Rs.200/- per month to the wife by way of maintenance. The plaintiffs have also filed the petition in M.C. No.44 of 1985 on the file of the IV Metropolitan Magistrate, Saidapet for maintenance against the 1st defendant.

(c) Since the plaintiffs are living separately from 1980, the 1st defendant had entered into a sale agreement with the 2nd defendant in respect of the suit properties and also transferred the rights and title of the same through Court in favour of the 2nd defendant by virtue of decree in O.S.No.104 of 1981 on the file of the II Additional Subordinate Judge, Chengalpattu. However, the plaintiffs are not parties to the said agreement and therefore, the same is not binding on them. Since the suit properties are joint family properties, the plaintiffs are entitled to 1/4th share in the

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properties. The 2nd defendant is not a bona fide purchaser for value and hence, the suit.

5. The 1st respondent/1st defendant remained exparte in the suit.

6. The contentions of the 2nd respondent/2nd defendant in the written statement are briefly as follows:-

(a) It is false to say that the 1st defendant is the father and the plaintiffs 2 to 4 were born to him through his first wife. On the other hand, the 1st plaintiff was married to one Thulukkanam of Siruthamoor and while the said marriage was subsisting, she became the concubine of the 1st defendant. Hence, the plaintiffs 2 to 4 cannot claim any share in the suit properties, as the 1st plaintiff is not the legally wedded wife of the 1st defendant.

(b) The allegation that the suit properties were purchased out of Rs.10,000/- received by him from his father Kanna Pillai by releasing his right and title in the family properties is denied as absolutely false. On the contrary, the 1st defendant purchased the suit properties out of his own income, as he was doing business and therefore he sold the same to this defendant for valuable consideration. Hence, the suit properties are the separate properties of the 1st defendant.

(c) The contention that the 1st plaintiff received maintenance from the 1st defendant is also denied as false. In fact, the 1st plaintiff is the concubine of the 1st defendant.

(d) The 1st defendant agreed to sell the suit properties to this defendant for Rs.13,500/- and executed an agreement to that effect on 17.10.1980 by receiving Rs.5,000/- as advance. This defendant was in possession of the suit properties from the date of the agreement. While so, since the 1st defendant refused to execute the sale deed, this defendant filed the suit for specific performance in O.S.No.104 of 1981 on the file of the Subordinate Court, Chengalpattu and obtained a decree. Subsequently, he filed an Execution Petition to have the sale deed executed in accordance with the decree.

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(e) A complaint was filed by the 1st defendant before the Judicial Magistrate, Saidapet alleging that the said agreement for sale was obtained by this defendant fraudulently and the same was ultimately disposed of as a false one. Having failed in that attempt, the 1st defendant in collusion with the plaintiffs has filed this suit in order to cause hardship to this defendant.

(f) However, the suit is bad for partial partition, as the other properties purchased by the 1st defendant have not been

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included in the plaint schedule. The 1st defendant purchased those properties in Adayar, Kottur and other places in Chennai. Therefore, the suit is liable to be dismissed.

7. On the above pleadings, the trial court framed the following issues:-

(i) Whether the 1st plaintiff was the legally wedded wife of the 1st defendant?

(ii) Whether the plaintiffs are entitled to the relief of partition as prayed for?

(iii) Whether the plaintiffs are entitled to the relief of permanent injunction against the 2nd defendant?

(iv) To what relief the plaintiffs are entitled?

Additional issue framed on 29.7.1992 is whether the suit properties are purchased by the 1st defendant out of his own income as alleged in the written statement.

8. On the side of the plaintiffs, 4 witnesses were examined and documents Exs.A-1 to A-9 were marked. The defendants examined 3 witnesses and marked 5 document as Exs.B-1 to B-5.

9. The learned District Munsif held on the above said issues that the 1st plaintiff is not the legally wedded wife of the 1st defendant; that the suit properties were the self-acquired properties of the 1st defendant and therefore the same were not the joint family properties of the plaintiffs and the 1st defendant available for partition; that the plaintiffs 2 to 4 are not the children of the 1st plaintiff and the 1st defendant; that the plaintiffs are not entitled to the relief of partition and permanent injunction; and that therefore the suit is liable to be dismissed.

10. The learned Additional Subordinate Judge on the basis of the recorded evidence and the arguments of both sides differed from the view of the trial Court and held that the 1st plaintiff is the legally wedded wife of the 1st defendant; that the plaintiffs 2 to 4 are the children born to them; that the documents marked as Ex.A-9 is not legally valid and binding on the 2nd defendant; that the suit properties are the self acquired properties of the 1st defendant; that the 2nd defendant having obtained a decree for specific performance in respect of the suit properties is entitled to the relief of possession of the suit properties; and that therefore the appeal is liable to be dismissed, as the appellants/plaintiffs are not entitled to any relief in the suit.

11. In the above circumstances, the substantial questions of law that arise for consideration in the above Second Appeal are as follows:-

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(i) Whether Ex.A-9 marked in the suit is a Receipt or Release Deed? and

(ii) Whether a minor's suit for partition of the property purchased from ancestral nucleus could be dismissed on the mere surmises and presumptions?

12. Heard Mr.J.R.K. Bhavanathan, learned counsel for the appellants, Mr.A.Kalaiazhagan, learned counsel for the 1st respondent and Mr.T.V.Krishnamachari, learned counsel for the 2nd respondent.

13. The relationship between the parties is not under dispute. Similarly, it is common ground that the 1st defendant, husband of the 1st appellant and father of appellants 2 to 4, purchased the suit properties measuring 5.70 acres from one Ranganatha Mudaliar for Rs.7,000/- by a registered sale deed dated 20.10.1977. The 2nd respondent filed the suit in O.S.No.104 of 1981 on the file of the Subordinate Judge, Chengalpattu on the basis of an agreement for sale executed by the 1st respondent in his favour in respect of the suit properties and obtained a decree (vide) Ex.B-1. It is not in controversy that the said judgment and decree rendered by the Subordinate Judge, Chengalpattu in the said suit had become final.

14. Now it is contended on behalf of the appellants by the learned counsel that since the suit properties had been purchased by the 1st respondent out of the funds received by him by way of consideration for the release of his rights in the ancestral properties, the suit properties acquired the character of joint family properties and therefore, it is urged that the appellants 2 to 4 are entitled to 1/4th share each in the suit properties.

15. The principle of law that one who asserts that the properties involved in the suit are joint family properties has to prove such allegation is not in dispute. In this context, the appellant has placed reliance on Ex.A-9, an unstamped and unregistered document in order to substantiate such contention put forth in the plaint. Evidently, Ex.A-9 had seen the light of the day only when the plaintiffs' evidence was about to be closed.

16. It is relevant to mention that the lower Appellate Court has clearly disbelieved the evidence of the appellant with reference to Ex.A-9 for the fact that the same had not been produced by the 1st respondent during the earlier proceedings in O.S.No.104 of 1981 on the file of the Subordinate Judge, Chengalpattu. Since the said document had seen the light of the day in this suit at the time of closing the evidence of the plaintiffs, the learned Subordinate Judge had correctly rendered the finding of fact that Ex.A-9 had been created for the purpose of the suit. On this aspect, the learned Subordinate Judge had held that the evidence adduced by the

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appellants to prove Ex.A-9 is not plausible, when regard being had to the previous conduct of the 1st respondent during the trial of the earlier suit between him and the 2nd respondent.

17. It is relevant in the circumstances to extract the recitals in Ex.A-9 so as to interpret the same to find out whether the said document is admissible in evidence.

> "நான் பாகப் பிரிவினை கேட்க தாங்கள் அதற்குப் பதிலாக எனக்காகவும், என் வாரிசுகளுக்காகவும் நான் வேறு சொத்து வாங்கும் பொருட்டு இன்றைய தேதியில் பங்காகக் கொடுத்த ரூ.10,000/–ஐ பஞ்சாயத்தார்கள் முன்னிலையில் பெற்றுக் கொண்டேன். இனி மேலும், நானோ எனது வாரிசுகளோ எனது பரம்பரை சொத்திலோ தாங்கள் சம்பாதித்த சொத்திலோ எந்தப் பாகமும் உரிமையும் கேட்க மாட்டேன் என்று உறுதி கூறுகிறேன்."

18. A careful perusal of the above document would indicate unmistakably that the document amounts to a release deed for the simple reason that the 1st respondent purported to have released his rights and title in the ancestral properties in favour of his father Kanna Pillai. It follows necessarily that as per Section 35 of the Indian Stamp Act, 1899, Ex.A-9 has no evidentiary value, as the same required to be stamped and registered compulsorily is not stamped and registered in accordance with law.

19. Section 35 of the Indian Stamp Act, 1899 reads as follows:-

> "35. Instrument not duly stamped inadmissible in evidence, etc.-- No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped."

20. Similarly, it is relevant to note Section 17 of the Indian Registration Act, 1908 which reads as under:-

> 17. Documents of which registration is compulsory.-- (1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No.XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877 or this Act came or comes into force, namely:--
>
> (a) ...
>
> (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish,

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whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees, and upwards, to or in immovable property;"

21. The ratio of the decision rendered by a Division Bench of this Court in R. DEIVANAI AMMAL AND ANOTHER v. G. MEENAKSHI AMMAL AND OTHERS (2005-1-L.W. 343) squarely applies to the facts of this case for the reason that in that case also, an unstamped and unregistered document came up for consideration regarding admissibility. It was held in this context as follows:-

"A family arrangement which is not stamped and not registered cannot be looked into for any purpose in view of the specific bar in Section 35 of the Indian Stamp Act.

Ex.B-28 is not only a document of family arrangement reduced to writing, but it purports to create, declare/extinguish right, title or interest of the properties of G. In such a circumstance, we hold that it must be properly stamped and duly registered as per the Indian Stamp Act and Indian Registration Act respectively."

In this case also, Ex.A-9 is similar to Ex.B-28 in the case referred to above.

22. A conjoint reading of both Sections 35 of the Indian Stamp Act, 1899 and 17(1)(b) of the Registration Act, 1908 in the light of the ratio of the above decision would indicate unmistakably that the unstamped and unregistered document, Ex.A-9 becomes inadmissible in evidence and it follows that the same cannot be looked into for any purpose. De hors Ex.A-9, the appellants have no case for the fact that the suit properties were admittedly purchased by the 1st respondent. Hence, this Court is of the opinion that the document under Ex.A-9 is inadmissible in evidence, that the same cannot be looked into to support the case of the appellants and that therefore the plea of the appellants that the suit properties were purchased out of the ancestral nucleus had not been proved by adducing satisfactory evidence.

23. Further, it is relevant to mention that subsequent revalidation of the document by paying stamp duty and penalty as contemplated under Sections 33 and 40 of the Indian Stamp Act, 1899 during the proceedings before the lower Appellate Court cannot at any stretch of imagination cure the defects as pointed out above and therefore this Court is of the considered view that the finding rendered by the lower appellate Court on this aspect of the matter has to be upheld.

24. Though the judgment of the lower Appellate Court concurred with the final verdict rendered by the trial Court in dismissing the

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suit, it differed in its finding with reference to the relationship between the appellants and the 1st respondent. While the trial Court held that the marriage between the 1st appellant and the 1st respondent had not been proved by adducing satisfactory evidence, the lower appellate Court was right in its reasoning that the factum of marriage between the 1st appellant and the 1st respondent was not disputed, as the 1st respondent remained exparte and more so the same has not been questioned by the 2nd respondent in the prior proceedings between him and the 1st respondent in O.S.No.104 of 1981 on the file of the Subordinate Judge, Chengalpattu. Therefore this Court is of the considered view that the learned Subordinate Judge is correct in holding that such contention put forth by the 2nd respondent is an afterthought and hence the same becomes unreliable.

25. For the reasons stated above, the Second Appeal fails and the same is dismissed accordingly. However, there will be no order as to costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Additional Sub Judge, Chengalpattu.

2. The District Munsif, Maduranthakam.

3. The Section Officer, V.R.Section, High Court, Madras.

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